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No. 02-682

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Second Circuit's ruling in this case makes far-reaching and erroneous law under Section 2 of the Sherman Act, vastly expanding unilateral antitrust duties to assist rivals, in conflict with other circuits' decisions strictly limiting such duties, including, but not only, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). The Second Circuit's ruling also discards longstanding limits on standing under the Sherman and Communications Acts, newly allowing suit based on indirect injuries (derivative of third parties' harm) and third parties' legal rights. This Court should review both aspects of the decision below, which, in conflict with other decisions, sets unprecedented and dangerous legal standards that, unless promptly corrected, will affect any firm in any industry, not just telecommunications, whose conduct can be challenged within the Second Circuit.

The legal issues squarely presented are important and require no further record development to decide, as *Goldwasser* holds. 222 F.3d at 401. Significantly, the United States and the Federal Trade Commission have taken the initiative to urge review, and, though addressing only the merits question, they do not suggest limitation of the grant to exclude the standing issue.[1] Respondent's arguments opposing review are meritless.

ARGUMENT

1. Respondent first attempts to show that the Second Circuit's decision does not conflict with *Goldwasser*. Opp.

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[1] *See* Nigro, *The Viability of Antitrust Suits in Local Telephony Markets: Developments Since* Goldwasser v. Ameritech, ANTITRUST REPORT 3, 4 (Winter 2003) ("[T]he differences * * * need to be resolved by the Supreme Court, as requested in a recently filed petition for *certiorari*. Until then, the weight of litigation will likely hinder the development of increased investment, innovation, and competition in local telephone markets, and could easily creep into other industries as it already has in the Second Circuit." (footnote omitted)).

5-10. This labored effort cannot withstand a simple reading of *Goldwasser* and the decision of the Second Circuit, which recognized that the cases involved "similar allegations of monopolistic conduct." Pet. App. 31a. The conflict is clear, as the Solicitor General expressly notes, stating that the decision below "conflicts with the decisions of other courts of appeals, including *Goldwasser*." SG Br. 8. Section 2 claims (like respondent's) based on deficient, discriminatory assistance to rivals on the very subjects covered by the new 1996 Act duties (47 U.S.C. § 251) were allowed by the Second Circuit here and rejected (on a motion to dismiss) by the Seventh Circuit in *Goldwasser*. Many such suits have been filed in the Second Circuit since the decision here, whereas none have been filed within the Seventh Circuit since *Goldwasser*.[2]

The *Goldwasser* court, speaking through Judge Diane Wood, was not making only the trivial pleading point that "merely pleading a violation of the Telecommunications Act does not state a claim for relief under the Sherman Act." Opp. 4. Rather, the *Goldwasser* opinion focuses on the *conduct* covered by the relevant 1996 Act provision (§ 251) and holds that such *conduct*—discriminatory assistance to rivals, including (as here) to firms engaged in economic resale—is not actionable under Section 2. *Goldwasser* clearly states its fundamental ruling:

> These are precisely the kinds of affirmative duties to help one's competitors that we have already noted *do not exist under the unadorned antitrust laws*. *** [T]he duties to which plaintiffs refer in paragraphs (1) through (20) of their complaint, which we have set out earlier, *go well beyond anything the antitrust laws would mandate on their own*.

[2] *See* BellSouth, SBC, and U.S. Telecom Ass'n Br. 3 n.2 & 15 n.3 (citing several district courts' reliance on *Goldwasser* to reject claims like respondent's on motions to dismiss and listing newly filed class actions).

222 F.3d at 400 (emphasis added). It is this basic limitation on Section 2 duties that the Second Circuit had to reject to reinstate respondent's claim.[3]

The just-quoted Section 2 ruling of *Goldwasser* applies by its terms to allegations that made no reference whatsoever to the 1996 Act. The last three of the referenced paragraphs (numbers (18) through (20)) alleged, with no dependence on the 1996 Act, that Ameritech failed to provide just, reasonable, non-discriminatory terms for local-market rivals to get access to its network on an unbundled basis; just, reasonable, nondiscriminatory wholesale prices to local-market rivals; and just, reasonable, nondiscriminatory terms for local-market rivals to connect to the local network. 222 F.3d at 395 (quoting complaint). Those allegations, which the *Goldwasser* court dismissed under Section 2, are not allegations that 1996 Act violations automatically constitute antitrust violations; and they are indistinguishable from what respondent describes as its allegations here, which "focused on Verizon's refusal to provide equal access to its network." Opp. 3.[4] The conflict with *Goldwasser* is inescapable.

[3] Only after holding that Section 2 does not require such assistance did the Seventh Circuit bolster its holding by reference to the elaborate regulatory and enforcement regime of the 1996 Act. 222 F.3d at 400-01. Respondent seems to accept that a regulatory regime is relevant to determining the proper scope of antitrust duties (Opp. 12, 14), but the regimes it cites (including those involved in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983)) did not provide the 1996 Act's guarantee, plain on the face of the statute, of prompt, judicially reviewable action on access claims. *See* Pet. 19 n.13. As in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), the regulatory "facts" here are apparent from *legal* sources, requiring no trial.

[4] Although respondent suggests that *Goldwasser*'s holding is at odds with the same court's earlier decision in *MCI*, *see* Opp. 7, in fact *Goldwasser* expressly supports the above-quoted holding with a citation to the part of the *MCI* case (222 F.3d at 400, citing *MCI*, 708 F.2d at 1149) where the Seventh Circuit *rejected* MCI's claim of access to

Indeed, respondent's counsel, in fighting for lead-counsel position against Milberg Weiss (the *Goldwasser* plaintiffs' counsel) in the newly filed class actions, recently acknowledged that the Second Circuit decision here newly allows "antitrust claims that had been blocked previously by *Goldwasser* * * *. [N]one of us would be here but for *Trinko* and after *Goldwasser*." Reply Br. 2, *Twombly v. SBC Comm. Inc.*, Civ. No. 302CV1617 (D. Conn. Dec. 9, 2002).

2. On the merits of the Second Circuit's antitrust ruling, respondent's approach is to re-write that ruling, betraying just how dramatic and wrong are the actual grounds of decision. Opp. 10-14. Respondent pretends that the Second Circuit upheld its complaint under the general monopolization standards defining necessary conditions for predatory conduct; but as the Solicitor General explains (SG Br. 9, 13), the Second Circuit did no such thing. The Second Circuit revived respondent's complaint wholly on the basis of essential facilities and monopoly leveraging standards, articulated without the ordinary Section 2 precondition that unilateral conduct, to be actionable, must "not make economic sense for the defendant but for its elimination or softening of competition." SG Br. 10. The Second Circuit's opinion states simply that "reasonable access" is required where access is essential to competition and that power in one market may not be "used" to "gain a competitive advantage" in another, Pet. App. 29a-30a, and it is those broad legal standards that threaten a wide range of lawful market conduct until corrected.

The Second Circuit's reliance only on essential facilities and monopoly leveraging standards, avoiding reliance on the normal Section 2 requirements, was hardly accidental. As the Solicitor General explains, the conduct alleged here cannot

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same-market facilities (*i.e.*, to AT&T's long-distance facilities). It is that aspect of *MCI*, not the ruling on access to local facilities for the long-distance business, that was relevant in *Goldwasser* and is relevant here. Pet. 12 n.6; *see also* Pet. 16-17 & 19 n.13.

meet the normal necessary condition for illegality, that conduct make sense for the defendant *only* because of monopoly returns from lessened competition. SG Br. 11-16. Incumbents like Verizon are required under the 1996 Act to sacrifice end-user sales and instead provide "access" even to mere economic resellers at steeply discounted rates. *See* Pet. 3 n.1. But the Second Circuit did not and could not condemn even an outright refusal to engage in such profit-sacrificing sales as making no ordinary business sense, as lacking economic sense but for a monopoly-level return. It is granting, not denying, the discounted access at issue that requires a sacrifice that a nonmonopolist would not freely make.[5] Even monopolists are entitled under Section 2 to "whatever rates they can obtain in the marketplace" (SG Br. 11; *see* Pet. 18 n.12 (quoting FCC)), and "[t]he antitrust laws do not require monopolists to sacrifice profits to sell to competitors at a discount." SG Br. 14.

3. Accordingly, the Second Circuit, to reverse the district court's dismissal of respondent's complaint, had no choice but to rely on its free-standing monopoly leveraging and essential facilities theories. Respondent offers virtually no defense of those grounds of decision, instead arguing mainly that they should not be reviewed here and now. Opp. 15-20. But the legal principles established by the Second Circuit's decision make dramatic new law that, until corrected, will be

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[5]In New York, where 25% of the business and residential lines are now served by competitors, about two thirds of the competitors' lines are leased under "unbundled network element" rates. FCC, *Local Telephone Competition: Status as of June 30, 2002*, tables 6, 8 (Dec. 9, 2002), http://ftp.fcc.gov / Bureaus / Common_Carrier /Reports/FCC-State_Link/IAD/lcom1202.pdf. Verizon now leases out those lines at an average of $19.14 per line, giving up the average of $41.98 per line revenue it obtains selling at full retail prices. NYPSC, *Analysis of Local Exchange Service Competition in New York State* 10-12 (2002), www.dps.state.ny.us/telecom/telanalysis.htm; NYPSC, *Press Release*, www.dps.state.ny.us/fileroom/doc11086.pdf.

exploited not only by the actual litigants that have already initiated some 32 class actions against telephone companies (and more against non-telephone companies, *see* UPS Br. 18), but by potential litigants across all industries. It is vital to settle the proper Section 2 standards now, and "further development of a factual record" is not required for that task. *Goldwasser*, 222 F.3d at 401; *see* SG Br. 18-19.

Respondent does not deny the intercircuit conflict over the monopoly leveraging theory newly revived by the decision below. Nor does it explain how the Second Circuit's standard for monopoly leveraging comports with the text of Section 2 or with *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). It is irrelevant that a general concept of "leveraging" between markets might be used to describe certain conduct that meets *other* antitrust standards, such as tying or monopolization under proper requirements for predatory conduct. It is likewise irrelevant that a regulatory context may help explain incentives and harms from *those* distinct violations.[6] Not surprisingly, neither the Solicitor General nor the non-telephone *amici* here consider the regulatory context to be pertinent to the Second Circuit's leveraging theory. The Second Circuit's standard condemns "using" power in one market "to gain a competitive advantage" in another, and that standard conflicts with other circuits' law, would inhibit pro-consumer vertical integration, and is wrong. "[U]se of monopoly power is not unlawful" (SG Br. 17), and neither is gaining a competitive advantage except by "the use of exclusionary techniques * * * that make economic sense for the monopolist only because they exclude competitors" (SG Br. 18).

[6] The theory that a regulated monopolist could use vertical integration to divert profits from a regulated business into an *unregulated* one (Opp. 16 n.9) has no application here, because the denial of wholesale local services (or access) would simply preserve regulated retail local services, leaving profits capped by regulation at the retail level.

Similarly, respondent wholly disregards how "dramatically" the Second Circuit decision "expands antitrust liability for failure to assist rivals" (SG Br. 8) by discarding limits on the lower courts' "essential facilities" doctrine for purely unilateral assistance duties. That doctrine, however often *recited* by the courts of appeals (Opp. 17-18), has virtually never been the basis for liability and has, in fact, been narrowly confined by multiple conditions that clearly exclude the local-network access duties asserted in this and similar cases. *See* Pet. 12-14, 16-18. Respondent nowhere denies the conflicts created by other circuits' recognition of those limitations; in particular, it ignores the fact—recognized by local-competitor AT&T—that, before the Second Circuit's decision here, the essential facilities doctrine did *not* apply to grant local-network access to would-be competitors in local markets themselves. *See* Pet. 17-18 n.12 (quoting extensive AT&T discussion of limits of essential facilities doctrine). The Second Circuit has created an unprecedented duty of unilateral surrender of monopoly assets to competitors, even mere economic resellers, at court-determined "reasonable" prices.

Respondent offers no support for such a duty and no answer to familiar and fatal objections based on investment incentives and institutional role. Respondent does not deny that this Court has never adopted an "essential facilities" doctrine. Respondent invokes *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and *Otter Tail*, *supra*, but the Solicitor General gives sufficient reasons that those decisions do not support a nondiscriminatory access obligation, let alone one applicable here. *Terminal Railroad* involved concerted, not unilateral, conduct, and the access duty was part of the remedy, not the liability standard. SG Br. 15 n.4. *Otter Tail* did not rely on "essential facilities" liability, but involved both a refusal to deal found to lack any explanation except maintaining monopoly and other, affirmative misconduct—sham litigation and entry into contracts

restricting potential competitors. SG Br. 13 n.3; *see also* note 3, *supra*; Pet. 16 n.10, 17 n.11, 19 n.13.

Certiorari should be granted on the first question presented, encompassing the Second Circuit's full Section 2 ruling. As the Solicitor General explains, "the conduct underlying respondent's monopoly leveraging claim is identical to the conduct at issue in the essential facilities claim" (SG Br. 17), and that conduct is not predatory (SG Br. 13-14). Unless and until corrected, the Second Circuit's holding that the conduct is nevertheless actionable will harm not only the telecommunications industry but "the entire national economy." SG Br. 20. The only "facts" relevant to correcting that decision, including the nature of respondent's claim and the legal guarantees of the 1996 Act regime, require no further development through costly litigation.

4. The question of standing (under both the Sherman and Communications Acts) should be reviewed along with the antitrust merits. Respondent's discussion (Opp. 20-23) confirms that the Second Circuit's standing rulings are unprecedented and, indeed, contrary to established standing limits recognized by this Court and other circuits. Pet. 23-26. These novel rulings open the courthouse doors to indirect purchasers seeking to bring class actions, deterring efficient dispute resolution between direct parties.

Regarding antitrust standing, respondent has no defense of the Second Circuit's ruling except to repeat that court's misreading of *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Opp. 20-21. The plain fact is that the plaintiff there was injured as a *direct* victim: the defendant refused to pay money to the plaintiff. As *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540 n.44 (1983), confirms, *McCready* involved "direct" injury—and so cannot possibly support standing based on injury, like respondent's, that is indisputably indirect, *i.e.*, derivative of harm to a third party. Respondent had no dealings with Verizon, and the alleged injury here is simply poor service received from AT&T caused by alleged harm to AT&T, Verizon's direct customer. Simply labeling this injury "direct" does not make it so, unless "direct" has no meaning.

Respondent's exclusive reliance on *McCready* shows how wrong and unprecedented the Second Circuit's decision is. Respondent does not mention the longstanding "requirement" of direct injury reiterated in *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992). Nor does respondent mention the indirect-purchaser bar of *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990), and its predecessor, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), or the circuit court decisions rejecting standing for customers' customers. *See* Pet. 25. And respondent cannot square the Second Circuit's abrogation of the traditional direct-injury requirement with the important policies that requirement serves. Concentrating full enforcement power in the directly injured party promotes enforcement, eliminates costly and uncertain causation and apportionment problems, and ensures that direct parties can resolve their disputes efficiently (here, through exclusive nonjudicial mechanisms), without the specter of yet further litigation and exposure to liability at the behest of outsiders impairing such resolutions.[7]

As to Communications Act standing, respondent again disregards the applicable direct-injury requirement, as recognized under statutes similar to 47 U.S.C. §§ 206, 207. Respondent repeats the Second Circuit's confusion of

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[7] *See* Epstein, *Into the Frying Pan: Standing and Privity Under the Telecommunications Act of 1996 and Beyond* (Dec. 2002), to be published in Col. Sci. & Tech. L. Rev., available at http://ssrn.com/abstract_id=362620; Landes & Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws?*, 46 U. Chi. L. Rev. 602, 604, 605 (1979) ("allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement").

"direct" injuries (referring to the causal chain) with "distinct" injuries (referring to the type of harm). Opp. 22. Respondent identifies no precedent in almost 70 years under the 1934 Communications Act allowing suit by the direct customer's customers (though purchase of service for resale, at tariffed rates, has long been practiced under that Act).

Respondent also ignores the second principle violated by the Second Circuit's decision allowing respondent to assert AT&T's legal rights (against discrimination) under the Communications Act: parties generally may assert only their own rights, not those of third parties. Respondent does not even attempt to offer precedent to support such third-party standing under this Act, let alone in the context of a suit by a customer's customer. In such circumstances, governing precedent under the Interstate Commerce Act, the predecessor of the Communications Act, recognized that only the direct victim can sue to vindicate its rights. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918).

The Second Circuit's radical standing rulings, in sum, have gone essentially undefended. They are fundamentally flawed, are properly resolved at the dismissal stage (as in *Associated General Contractors*), and will, if not corrected, work substantial harm to the interest in efficient law enforcement and dispute resolution—for businesses generally (in the case of the antitrust ruling) and for the telecommunications industry specifically (in the case of the Communications Act ruling). This Court should review the standing rulings along with the Sherman Act ruling of the Second Circuit.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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